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Criminal Procedure--Instructions to Juries--Weight of Evidence

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of the purposes or occupations mentioned in this paragraph."¹³

Note that the word "knowingly", used in the act of 1907, does not appear in the latter statute, which also eliminates the provisions relating to cases of doubt as provided for in the former. Might not the court, in view of the change in the statute of 1919, have very well said that the legislature intended, by omitting these provisions from the statute, to make a change in its meaning, denying to the person who violates the statute the defense, in a suit of the kind under consideration, of showing that he was not negligent in violating it? Nevertheless the court has not done so. It apparently understood the statute merely as raising the prohibited age from fourteen to sixteen years. In *Waldron v. Garland-Pocahontas Coal Co.*,¹⁴ which is the latest West Virginia case dealing with this statute, the court indicates, at least, that it considers the doctrine of the Norman Case unchanged by the statute.¹⁵ It is submitted that in an action of this kind the court should denominate violation of the statute in question at least negligence *per se*.

—W. F. K.

CRIMINAL PROCEDURE—INSTRUCTIONS TO JURIES—WEIGHT OF EVIDENCE.—The West Virginia Supreme Court in two recent cases¹ held that an instruction which tells the jury that "they are the sole judges of the evidence and of the weight to be given thereto, and that they may believe, or refuse to believe, any witness or any part of his evidence, and that when passing upon the credibility of any witness they may take into consideration his interest in the matter in controversy, the reasonableness or unreasonableness of his statements, his bias or prejudice in the matter, if any appear, and his demeanor upon the witness stand", is erroneous, prejudicial and reversible error. The court cites to support its decision the case of *State v. McCausland*,² wherein the court had held that this same instruction was erroneous on the ground that it would permit the jury to reject the testimony of a witness arbitrarily. It would seem that the reasoning of the court is hardly applicable to the particular instruction in question, for the reason

¹³ Acts 1919, Ch. 17, § 2.

¹⁴ 109 S. E. 729 (W. Va. 1921).

¹⁵ *Id.* At p. 731 it is said: "The fact that the child is under sixteen years of age makes the employment unlawful; and, if injury results, there is *prima facie* negligence on the part of the employer. See *Norman v. Coal Co.* . . ."

¹ *State v. Long*, 108 S. E. 279 (W. Va. 1921); *State v. Weisengoff*, 109 S. E. 706 (W. Va. 1921).

² 82 W. Va. 525, 96 S. E. 938 (1918).

that the instruction does not tell the jury that they can arbitrarily disregard the testimony of any witness. Instead, it goes ahead and tells the jury what elements they may take into consideration when passing upon the credibility of a witness.

Even if we adopt the view of the court that this instruction might be misleading, it is difficult to justify the court's actual decision that the giving of such instruction was reversible error. It would seem that the West Virginia court failed to follow the modern tendency not to reverse in a criminal case unless the court believes the error to have resulted in a substantial miscarriage of justice.³ In each of these cases the juries were composed of reasonable men whose sworn duty it was to determine the guilt of the defendant. They were unquestionably the sole judges of the evidence and the weight to be given thereto. Is it to be presumed that the jury acted as unreasonable men and arbitrarily and without reason disregarded the testimony of any witness? Several jurisdictions have the rule that if there has been error that might have prejudiced the defendant there must be a reversal.⁴ However, the better and more modern rule seems to be that the defendant must show that there has been error and that such error has been prejudicial to him.⁵ Although this rule has probably not yet received the sanction of the majority of the courts in this country, it is the rule that has prevailed in the English appellate courts for many years, and is the rule that is now favored by our most advanced thinkers in criminal procedure.⁶ In 1910 the American Bar Association passed a recommendation that there should be no reversal by the appellate court unless the court actually believed the error to have resulted in the miscarriage of justice.⁷ The committee in charge of this matter reported that such a rule already prevailed in the courts of New Hampshire, Massachusetts, Kansas, Wisconsin and several other states.⁸ In 1919 Congress embodied this recommendation into our Judiciary Act, and it is therefore the rule that now

³ See Nathan A. Smyth, "The Limitation of the Right of Appeal in Criminal Cases," 17 HARV. L. REV. 317. For a complete discussion of this subject see 35 REPORTS OF AMERICAN BAR ASSOCIATION, 624 *et seq.*

⁴ *Boyd v. State*, 16 Lea. (Tenn.) 149 (1885); *Boren v. State*, 32 Tex. Cr. R. 637, 25 S. W. 775 (1894).

⁵ *Coleman v. State*, 6 Okla. Cr. 252, 118 Pac. 594. (1911). For a discussion of this case see 25 HARV. L. REV. 387, and the cases there cited. *Regina v. James Courtney*, 7 Cox Cr. Cas. 111. See 15 YALE L. J. 1.

⁶ See Nathan A. Smyth, "The Limitation of the Right of appeal in Criminal Cases," 17 HARV. L. REV. 317; J. H. Wigmore, "Criminal Procedure—'Good' Reversals and 'Bad' Reversals," 4 ILL. L. REV. 352.

⁷ See 35 REPORTS OF AMERICAN BAR ASSOCIATION, 624 *et seq.* The precise language of the recommendation of the American Bar Association is taken from Order 39, Rule 6, of the Rules of the English Supreme Court of Judicature.

⁸ See, 35 REPORTS OF AMERICAN BAR ASSOCIATION, 624, 629, and cases there cited.

prevails in our federal courts.⁹ California has adopted the same rule by constitutional amendment.¹⁰

In neither of these two West Virginia cases¹¹ does it appear that the instruction given resulted in a miscarriage of justice. Nor is there anything in either case to indicate that the finding of the jury would have been different if this instruction had not been given. One of the leading writers on this subject has said: "As for errors in judges' charges it is doubtful if in cases where the testimony is *prima facie* sufficient to prove the crime, a verdict is ever unjustly influenced by such error. Juries do not convict unless they are convinced of moral guilt."¹² Today it is almost impossible for the trial court to try a case without committing some error,¹³ and for that reason our most advanced thinkers have come to the conclusion that it is best for our appellate courts to disregard technical errors and to reverse only where it will be in the furtherance of substantial justice. In an extrajudicial article written some twelve years ago our present Chief Justice Taft recommended that "No judgment of the court below should be reversed except for an error which the court, after reading the entire evidence, can affirmatively say would have led to a different verdict."¹⁴

The West Virginia court had for many years held that the instruction in question correctly laid down the law.¹⁵ The trial courts of the state, relying on these earlier cases, have often given this instruction. If the West Virginia court continues to follow its present doctrine it must necessarily result in a reversal of many convictions where this instruction has been given. Would it not be better to follow the theory of Judge Pound of the New York

⁹ "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects or exceptions which do not affect the substantial right of the parties." See 36 STAT. AT L. 1163; BARNES' FEDERAL CODE, 1921 Supplement, ch. 11, § 1043.

¹⁰ See CAL. STAT. OF 1911, 1798, c. 36.

¹¹ *State v. Long, supra*; *State v. Weisengoff, supra*.

¹² See Nathan A. Smyth, "The Delimitation of the Right of Appeal in Criminal Cases," 17 HARV. L. REV. 317.

¹³ *Lewis v. Long Island R. Co.*, 162 N. Y. 52, 67, 56 N. E. 548 (1900). The court in that case says: "After carefully and studiously examining the great number of perplexing and difficult questions determined during the heat and excitement of a sharp and protracted trial we can but admire and commend the scrupulous and intelligent care and ability evinced by the trial judge, and the almost unerring correctness of his ruling. When the number and variety of the questions raised are considered, we are surprised, not that a single error was committed, but that there were not many more."

¹⁴ See 15 YALE L. J. 1.

¹⁵ *State v. Dickie*, 48 W. Va. 325, 37 S. E. 695 (1900); *State v. Bickel*, 53 W. Va. 597, 45 S. E. 519 (1903).

Court of Appeals, to review each case largely on its merits, rather than rigidly to fetter the court with prior decisions without regard to actual justice?¹⁸

—M. T. V.

CARRIERS—UNIFORM BILL OF LADING—LIABILITY AS INSURER OR WAREHOUSEMAN.—This was an action to recover for an interstate shipment of goods consigned under a uniform bill of lading, requiring forty-eight hours, after notice to the owner of arrival, before liability as insurer ceased and that of warehouseman began. Notice had been given, but the time period for removal had not expired when the goods were destroyed. *Held*, the carrier was liable as insurer for the value of the property. *Del Signore v. Payne, Director General of Railroads*. 109 S. E. 232 (W. Va. 1921.)

There are three distinct views as to the liability of a carrier for loss occurring after arrival and before delivery of a consignment. The Massachusetts court applies the doctrine that insurance liability, *ipso facto*, terminates when the shipment arrives at its destination and is placed in the warehouse. *Norway Plains v. Boston & Maine R. Co.*, 1 Gray 263, 61 Am. Dec. 423. New Hampshire enforces the rule that a reasonable time for removal should elapse before the carrier is discharged from its extraordinary liability. *Moses v. Boston & Maine R. Co.*, 32 N. H. 523, 64 Am. Dec. 381. The third rule, enunciated by the New York Supreme Court, holds that the insurance liability of the carrier continues until the consignee has been notified of the arrival of the goods, and has had a reasonable time to take them away after such notification. *McDonald v. Western R. Co.*, 34 N. Y. 497. The various state courts seem to be in irreconcilable conflict as to the application of these rules. Each doctrine has its advocates, who claim that a certain one represents the sounder view. A North Carolina case says, "Not only does the great weight of authority in this country sustain the view of Judge Cooley (N. Y. rule), but such is the English and Canadian law." *Poythress v. Durham & Southern R. Co.*, 148 N. C. 391, 62 S. E. 515, 18 L. R. A. (N. S.) 427 and note. England applies the rule requiring notice. *Mitchell v. Lancashire etc. R. Co.*, L. R. 10 Q. B. 256, *Chapman v. Great Western R. Co.*, L. R. 5 Q. B. Div. 278.

¹⁸ Cuthbert W. Pound, "Some Recent Phases in the Evolution of Case Law", 31 YALE L. J. 361.